FILE COPY

FILED
APR 28 1931
CHARLES ELMORE CROPLEY
CLERK

Supreme Court of the United States

OCTOBER TERM, 1930.

No. 543.

MINNEAPOLIS, ST. PAUL & SAULT STE. MARIE RAILWAY COMPANY,
Petitioner,

vs.

NOAH MOQUIN,
Respondent.

MOTION TO STRIKE PORTIONS OF PETITIONER'S BRIEF AND RESPONDENT'S BRIEF.

TOM DAVIS AND ERNEST A. MICHEL,
Attorneys for Respondent,
419 Metropolitan Bank Building,
Minneapolis, Minnesota.

Hayward Brief Co., 601-7 Fourth Ave. So., Minneapolis

INDEX.

	Page.
Motion to Strike Portions of Petitioner's Brief	1
Notice of Motion	2
Respondent's Brief	3
The Motion to Dismiss the Writ as Improvidently Granted or to Affirm Said Cause	3
Statement of the Case	3
Statement of Facts	4
The Argument of Counsel for Respondent	5
No Objection to Counsel's Argument	5
Defendant's Argument Not Before the Court	5
Entire Argument Should Be Considered	6
No Opportunity to Correct Statements to Jury	7
Discussion of Liability. Reference to Railroad Counsel	8
Assumption of Risk—Legal Questions	10
Question on Certiorari Limited	10
Verdict on Liability Not Result of Passion or Prejudice	11
Argument on Damages	11
No Appeals to Passion or Prejudice	13
No Appeals to Sympathy	16
Damages Not Excessive in Fact	18
No Objection to the Argument	20
The Claim of Petitioner	21
Moquin's Testimony in Direct Conflict With That of Defendant's Witnesses	21
No Error in Reference to Defendant Company or Handicaps of Plaintiff	23
The Position of the Supreme Court of Minnesota	26
The Alleged Error or Prejudicial Conduct as to Counsel's Argument Relates to the Question of Damages	27
Argument	29
The Petition for Writ of Certiorari Was Improvidently Granted and it Should Be Dismissed	29
The Minnesota Rule	30
The Alleged Passion Relates to the Question of Damages	32
The Decision of the Supreme Court of Minnesota on the Question of Defendant's Liability	33
Petitioner's Shifting Positions	35
The Attack on Counsel for Plaintiffs Generally	37
Conclusion	42

TABLE OF CASES.

Page.

Chesapeake & Ohio R. Co. vs. DeAtley, 241 U. S. 310, 60 L. Ed. 1016 ..... 29, 31

Central Vermont R. Co. vs. White, 238 U. S. 506, 59 L. Ed. 1433 ..... 29, 31

Jones vs. East Tennessee, V. & G. Ry. Co., 128 U. S. 443, 9 Sup. Ct. 118, 32 L. Ed. 478 24

Minneapolis, St. P. & S. S. M. R. Co. vs. Moquin, 51 Sup. Ct. Rep. 105 4

Minneapolis & St. Louis R. Co. vs. Bombolis, 241 U. S. 211, 60 L. Ed. 961 ..... 29, 31

N. Y. Cent. vs. Johnson, 279 U. S. 310 ..... 4, 36

Norfolk & W. Ry. Co. vs. Holbrook, 235 U. S. 625, 35 Sup. Ct. Rep. 143, 59 L. Ed. 392 24

St. Louis, I. M. & S. Ry. Co. vs. Craft, 237 U. S. 648, 59 L. Ed. 1160 32

In re Webber's Estate, 163 Minn. 389, 204 N. W. 52 30

Supreme Court of the United States

OCTOBER TERM, 1930.

No. 543.

MINNEAPOLIS, ST. PAUL & SAULT STE. MARIE RAILWAY COMPANY, *Petitioner,*

vs.

NOAH MOQUIN, *Respondent.*

MOTION TO STRIKE PORTIONS OF PETITIONER'S BRIEF.

Now comes the above named respondent and moves to strike from the record and eliminate from consideration herein all that portion of the Brief of the Petitioner commencing on the middle of page 13 of said Brief to and including page 27, and the first five lines of page 28, on the following grounds:

1st: That the matter in said Brief above referred to is not material, pertinent or relevant to any issue now before this Court.

2nd: That it is intemperate, inflammatory, frivolous, is intended and designed to prejudice the Court and that the same constitutes an unwarranted attack on counsel for Respondent.

3rd: That the portion of said Brief above referred to is not pertinent to the matter here under review, the petition

for certiorari herein having been limited to the question of whether the particular verdict involved in this case "was obtained by appeals to passion and prejudice." See opinion of this Court upon the granting of the Writ, 51 Sup. Ct. Rep. 105.

TOM DAVIS AND ERNEST A. MICHEL,
Attorneys for Respondent,
419 Metropolitan Bank Building,
Minneapolis, Minnesota.

NOTICE OF MOTION.

The Petitioner herein is hereby notified that Respondent will, upon the hearing of this cause, before the Supreme Court of the United States submit for the consideration of said Court the foregoing Motion to strike portions of Petitioner's Brief on the grounds stated in said motion.

TOM DAVIS AND ERNEST A. MICHEL,
Attorneys for Respondent,
419 Metropolitan Bank Building,
Minneapolis, Minnesota.

RESPONDENT'S BRIEF.

THE MOTION TO DISMISS THE WRIT AS IMPROVIDENTLY GRANTED OR TO AFFIRM SAID CAUSE.

Heretofore and after the granting of the petition for Writ of Certiorari herein, a motion was made to dismiss the Writ of Certiorari on the ground that the same was improvidently granted, or in the alternative to affirm said cause.

The consideration of said motions were by this Court held in abeyance and the determination thereof postponed to the hearing of the case on its merits.

STATEMENT OF THE CASE.

Respondent, a freight brakeman, was injured by the derailment of a freight car, caused by snow and ice over the rails of one of defendant's tracks, which caused the car in question to leave the tracks, resulting in serious personal injuries to respondent.

A jury found a verdict in Respondent's favor for $27,500.

The trial court denied a motion for judgment notwithstanding the verdict or for a new trial.

The Supreme Court of Minnesota in all things affirmed the trial court, save that it reduced the verdict to $22,500.00.

After judgment was entered a Petition for Writ of Certiorari was filed in this Court.

Many grounds for the granting of the Writ were alleged. The principal claims related to the question of the place to work (p. 11 of Petition for the Writ); the claim that plaintiff was engaged in making an unsafe place safe (p. 14 of Petition) and the claim that there was no finding of a failure to use ordinary care (pp. 16-20 of Petition). The question

of passion and prejudice was apparently a sort of afterthought, Petitioner realizing it had waived the point under the state practice and attempting to avoid the state rule under the doctrine of *N. Y. Cent. v. Johnson*, 279 U. S. 310 (p. 20 of Petition). In the brief of Respondent in opposition to the granting of the Writ it was pointed out that the Johnson case had no application, that case having been tried in a Federal Court and *involving no state rule of practice*. The Johnson case is not even cited in Petitioner's Brief on the merits.

This Court granted the Writ saying: "The Petition for a Writ of Certiorari in this case to the Supreme Court of the State of Minnesota is granted, *limited* to the question arising from the failure of the state court to grant a new trial in a case under the Federal Employers' Liability Act where the *verdict was obtained* by *appeals* to passion and prejudice." *Minneapolis, St. P. & S. S. M. R. Co. vs. Moquin*, 51 Sup. Ct. Rep. 105.

Following the granting of the Writ, Respondent moved to dismiss the same as improvidently granted, or, in the alternative, asked the Court to affirm the judgment below. Consideration of this motion was by the Court ordered to be heard when the matter was argued on the merits.

STATEMENT OF FACTS.

This is an ordinary, simple personal injury action in which a railroad freight brakeman was injured because a freight car left the track, due to the negligence of section men in permitting ice and snow to be over the rails. *This was the claim of the plaintiff* and the jury having found in plaintiff's favor it must be taken as established that such were the facts.

THE ARGUMENT OF COUNSEL FOR RESPONDENT.

This Court, in granting the Writ of Certiorari, limited it to the question of whether error was committed by counsel in his argument to the jury, that is "by appeals to passion and prejudice."

The practice in Minnesota requires defendant's counsel to make the first argument which practice was followed in this case. Under the state practice each side has but one argument.

In the Petition for the Writ of Certiorari and in the Brief in support thereof and in the Brief of Petitioner, which is supposedly on the merits of this cause, portions of the argument of counsel for Respondent are set forth with the claim that the same constitute prejudicial misconduct. A few isolated phrases are quoted which do not convey a proper idea of the argument.

NO OBJECTION TO COUNSEL'S ARGUMENT.

No objection was made to counsel's argument, no exception taken thereto and the Supreme Court of Minnesota held that the "record was not protected." We will, however, consider for the present the argument on its merits.

DEFENDANT'S ARGUMENT NOT BEFORE THE COURT.

The argument of counsel for Respondent was taken by the court reporter. *The record does not show the argument of counsel for the railroad company.* In view of this fact it would not be proper for counsel for Respondent to quote the nature of the argument of railroad counsel nor to char-

acterize railroad counsel because of what occurred in his argument to the jury. One thing can be pointed out to the Court, however, and that is that the *Brief* of Petitioner in this case, and especially pages 13 to 28, *is so inflammatory, prejudicial, unfair and wholly irrelevant* that the Court might well conceive what type of argument counsel, who will present this sort of a brief to the Supreme Court of the United States, would be likely to present to a jury. This Court is here faced with a situation similar to that where only a part of a conversation is given. The argument of plaintiff's counsel appears but the Court does not have defendant's argument.

ENTIRE ARGUMENT SHOULD BE CONSIDERED.

To revert now to the argument of Mr. Davis to the jury:

It is a fundamental rule of law that a new trial will not be granted because of errors in the charge of the Court to the jury where these errors consist of mere isolated statements or a sentence here and there in the charge. Such excerpts must be read in connection with the entire charge.

Likewise, assuming that the Court can consider the merits of the claim of Petitioner herein, the Court should consider *the entire argument of Respondent's counsel.* This argument starts at page 383 of the record. We very earnestly suggest to the Court a most careful reading of it. It is a fair, clean, forceful argument but it is not an appeal to passion and prejudice.

Pages 383 to 390, inclusive, and 391, deal with some generalities and largely with the question of liability in this case. The argument is a fair and proper discussion of the facts and no just cause for criticism of it can be found.

At the bottom of page 391 and the top of page 392, counsel

made the following statement:

> "I have often wondered, in the years I have tried cases for these poor devils who are injured, and for their widows and orphans, who have to fight for their rights against these railroads, I have often wondered if the time would ever come when an injured man could come in a court of justice without having a railroad company try to fasten upon him that he was a perjurer and a liar. I wonder if it is true that the only time men can tell the truth is when they draw their pay checks from the railroad company. These men know where their pay checks come from, from the Soo Railroad, and I say it discounts their testimony, the same as it discounts anybody else's testimony."

The first part of this quotation is one of the statements that Petitioner's counsel, who presented this most prejudicial brief, say constitutes prejudicial error. There is no question but that the jury had a right to consider the interest of any witness in the outcome of the case and the Court so instructed them.

NO OPPORTUNITY TO CORRECT STATEMENTS TO JURY.

What lead to the remark that the railroad company was trying to fasten the charge of perjury onto plaintiff? It is fair to assume that some conduct of the defendant brought forth this comment. Was it because of the fact that *after plaintiff and three disinterested witnesses testified ice covered the rails* that the company *tried to show that the derailment occurred before the car reached the ice?* As the Supreme Court of Minnesota in this case said: "Defendant's

evidence puts the derailment *before it reached the crossing* and attempts to attribute the derailment to the presence of snow only" (467).

Had there been an objection to the argument of counsel for Respondent, *counsel could have stated for the record* that his language was *in answer to certain language of counsel for Petitioner* or that the statement was made because of something that developed at the trial but we have no record of any interruption or objection and no record of what counsel for the railroad company said in his argument to the jury.

Does it seem possible to this Court that where the railroad company *first denied that there was ice over the rails* and *then* claimed that the derailment occurred *at a place other than where the ice was proven to be*—under such circumstances would railroad counsel be likely to extol the virtues of the plaintiff as an honest man?

Moquin was either telling the truth or he was telling a falsehood. Under the circumstances it would be difficult for the Court to assume that railroad counsel told the jury that plaintiff was an honest man and that he was telling the truth. To admit that Moquin told the truth would be practically admitting liability. Although we do not have the argument of counsel for the railroad company, we do have the vigorous denial of any liability.

DISCUSSION OF LIABILITY. REFERENCE TO RAILROAD COUNSEL.

Pages 392 and 393 deal with the question of liability and on page 393 counsel for Respondent pays a nice compliment to the counsel for the railroad company.

On page 394 there is a further discussion of the evidence as to liability as there is on pages 395, 396 and 399. How-

ever, in referring to one of the counsel for the railroad company, Mr. Fryberger, plaintiff's counsel said:

> "You either have to go out, men and women, and find that these three men from Cloverton lied and the only men who can tell the truth are these section men who are responsible for this very accident or else you have to find that this plaintiff ought to recover, and I say the time, I doubt if it comes, when three men looking as honest and hard-working and square as those men, come into a court of justice—working over there at Cloverton in the wilderness, taking care of their families, their wives and their little children, they come here to you men and women and they have told you the living truth of the living God and no man knows it better than Fryberger. *He has sat in this case, one of the keenest, able corporation lawyers in the great state of Minnesota, a man cool, calculating and who has been the guiding spirit in this defense.* He has sat here, men and women, suggesting to Mr. Boyle what steps he should take and what he should ask. There is not a man, there is not a woman, on this jury who does not know that Mr. Brewer and Mr. Halstad and Mr. Burden told the truth when they said there was ice under the wheels of those cars where they went off the track."

This excerpt certainly contains no calculated appeal to passion and prejudice. It is legitimate argument.

The Brief of Petitioner states that Petitioner's counsel was called a "'cool, calculating' corporation lawyer" (Petitioner's Brief, page 4). This is *misleading*. From the quotation just made it is seen that Respondent's counsel said of Petitioner's counsel that he was "one of the keenest, able corporation lawyers in the great state of Minnesota, a man

cool, calculating, and who has been the guiding spirit in this defense" (R. 397). What is wrong with that statement? We submit that an appellate court cannot say as a matter of law that the statement that a man is one of the keenest, able corporation lawyers in the State is an inflammatory statement, designed to prejudice the jury. Neither is the statement that an attorney is "a man cool, calculating" in any way prejudicial.

"A."

ASSUMPTION OF RISK—LEGAL QUESTIONS.

On page 398 the question of assumption of risk is discussed and the question of a mere accident is discussed on page 399. Also on pages 399 and 400, the question of proximate cause is discussed. General questions of liability are further discussed on pages 401, 402 and 403 and then on the last paragraph on page 403, counsel comes to the question of damages.

QUESTION ON CERTIORARI LIMITED.

The Petition for Certiorari was granted in this case and limited to the question of the failure of the state court to grant a new trial "where the verdict was obtained by appeals to passion and prejudice." In the present case, the *verdict* was not obtained by appeals to passion and prejudice. There is no passion and prejudice shown in the argument of counsel. Other than this, there is no attempt to show passion and prejudice, save by the mere size of the verdict.

VERDICT ON LIABILITY NOT RESULT OF PASSION OR PREJUDICE.

The verdict on the question of liability was not the result of passion and prejudice, because the verdict could not be otherwise than in plaintiff's favor under the great mass of testimony supporting plaintiff's claim. The *amount* of the verdict, the *size* of the verdict, might possibly be said, assuming Petitioner's position to be correct, to be the result of passion and prejudice, but, if so, we have a case where *merely the amount* of the verdict is the result of passion and prejudice and *not a case where the ultimate right of recovery rests on passion and prejudice.*

ARGUMENT ON DAMAGES.

The portion of the argument devoted to damages is made the target for Petitioner's criticism.

We quote the first part of counsel's argument on this question:

> "We come now to the measure of damages. What should this man recover? Now, I know something about juries. I think I know something about the difficulties of trying these cases. I think I know something about the difficulties of a man, single-handed, fighting a powerful corporation. I think I know something of the feeling of superiority that sometimes reposes in the breasts and hearts of men who represent corporations. I think I know somewhat the handicaps that may surround a man who will fight for what they call the underdog. I have tried cases under those laws as far West as Montana and as far East as the State of Ohio. I have addressed juries in those states in behalf of injured men

and the widows and orphans of men who were killed, and I want to say to you men and women of Crow Wing county, never in my life have I seen as ingenious and dishonest a defense as is put up in this case" (403-404).

What gave rise to the remark as to "the feeling of superiority that sometimes reposes in the breasts and hearts of men who represent corporations"? (R. 403.) This Court does not have the argument of railway counsel before it. This Court does have, however, the Brief of Petitioner and if pages 13 to 28 do not show a feeling of superiority on the part of defendant's counsel, who point to the words "abuse of the legal profession," "improper and demoralizing Practices" (p. 14, Brief of Petitioner), we do not properly interpret the meaning of words. To say that the Amendment of Congress "has been flagrantly perverted" (p. 15, Petitioner's Brief); to complain about "imported cases"; to insinuate that plaintiff's counsel are an "offshoot of the legal profession" (19); to speak of "notorious practices in flagrant violation of representative professional opinion"; to charge violation of laws of other states (19); to speak of "champerty," inferentially charging Respondent's counsel therewith (24); to insinuate that "imported cases are made by perjury" (25); to speak of "open and habitual champerty" (25); to speak of "illicit investments" and "illicit methods of recovery" (26-27)—all such remarks and statements in the Brief of Petitioner must certainly convey to this Honorable Court some idea not only of the feeling of superiority of Petitioner's counsel but such statements disclose an amazing lack of fairness and a gross violation of ethics and the rules of this Honorable Court. More especially is this true when the statements above are made with reference to so-called "imported cases." *The present*

case arose in the State of Minnesota. Plaintiff lived in the State of Minnesota at the time he was injured. The Brief of Petitioner, on page 13, says, *"The present case was not an imported one."* Even were the case one which arose in another state, there would be no justification for the statements and insinuations contained on pages 13 to 28 of the Brief.

Because a lawyer happens to represent poor people, must he submit to any attack corporation counsel may see fit to make; must he see his clients pilloried and make no defense; must he even witness the spectacle of having a railway company claim, first, that ice did not cover the rails and cause the car to leave the track, and, in the next breath, to say that the derailment occurred at a place other than where the ice covered he track? Can the railroad company make such claims with the insinuations which must follow and still insist that a plaintiff's counsel remain entirely silent and not come to the defense of his client?

NO APPEALS TO PASSION OR PREJUDICE.

Again at the start of the argument on the question of damages, counsel uses this language:

> "Here comes a man in the prime of life, forty-six years of age, giving to this mighty railroad eighteen of the best years of his life, working for them, and because of their negligence and because of the laziness of those section men, he is hurled from the top of a moving car, fourteen to twenty feet, weighing 212 pounds, landing on his feet on the solid ice and ground below and falling on his back, and but for the providence of Almighty God, had he not turned himself away, he would have been crushed under the moving wheels of that car. And we

find a railroad company coming into court to fight that man and send him out of this court room stamped as a cheat and a fraud. Moquin has told you the truth. If these three men from Cloverton had never come here, the testimony of that simple, honest man, standing alone, would be enough to convince any honest man or woman that the Soo Railroad, in common decency and common honesty, if they possess it, should pay this man. I want to say to you men and women I do know what it costs to fight a railroad. It is hard. It is not easy. It is hard. I know that oftentimes as I try these cases —and I am not an extremely religious man, but perhaps from a good mother I have learned at times to even ask the aid of a Divine Power to give me strength to present cases honestly. I have passed the half century mark. It will not be many years, perhaps, before I will be through trying lawsuits. I love to try them. I love the fight, but it is hard, and it is hard because of the neglect. Why couldn't this railroad have photographed that track? Why didn't they? Just ask yourselves when you go out in the jury room" (404).

The two quotations above are not designed appeals to the passion of the jury. They were not so intended and should not be so construed.

At page 404, Counsel makes reference to the fact that the attorney for the railroad company had suggested to the jury that the plaintiff should not have over $6,000.00. After referring to this statement, plaintiff's counsel said:

"*He is not asking for a dollar he has not lost.* This man is not asking for a red cent *that is not his.* But by the eternal gods *he is entitled to what he has lost* and it is not $6,000.00, as we discuss this testimony. And

let me tell you if this jury should bring in $26,000.00, the first men to send a wire to Minneapolis and laugh would be Fryberger and Boyle" (405).

This is not inflammatory. The jury were not asked to punish the defendant. They were asked to give plaintiff compensation. It certainly is legitimate argument to ask a jury to adequately compensate an injured man.

As showing the fairness of the argument of counsel, we quote the following:

"I am not asking you for a dollar in this case except what the evidence shows this man should have, and if that is a large amount I want him to have it and the Soo Railroad ought to want him to have it" (407).

Is this an appeal to prejudice? Can it be said to arouse the passion of the jury to ask them to give what the evidence shows plaintiff is entitled to?

Counsel also stated to the jury the following:

"Now, he don't have a run as a conductor and he never could get it, because there isn't a railroad company in the world that would hire him in that condition and you know that. So what will he do? I can see him, along with thousands of others marching, dragging himself up to the doors of the factories and the workshops of America, and I can see him applying for work and by his side see thousands of men out of employment, with two strong arms and two solid legs and a solid back, in competition against him. Who is going to hire him? Just stop and think about it. He is handicapped for life. He goes out into an economic world, men and women, handicapped by the negligence of his master and when he raps at the door and says, 'I want to work,' by the side of him is a strong man who says, 'I

want to work and I will work for the same wages and there is not a thing the matter with me,' who is going to be hired?" (408.)

Is there anything wrong about this language:

"I think it would be a terrible thing if in ten years from now you, in the same condition, could not earn a livelihood, could earn probably $60.00 a month. Is there any reason why you should do it? Is there any reason why you should take away from this man one cent that he has coming? I say to you men and women I have tried these cases long enough to know human nature and before this jury brings in a verdict of that kind, as a tribute to the line of defense the Soo Line has put in here, don't bring this man a dollar. Send him out stamped as a fraud, a cheat, a faker, *rather than give him a verdict that he is not entitled to*" (410).

NO APPEALS TO SYMPATHY.

At no place in the argument was the jury told to treat the defendant any differently than any other defendant. Counsel did not ask the jury to punish the defendant because it was a railroad corporation. Counsel merely asked the jury *to give plaintiff what he was entitled to.* If the time has come when it is wrong to ask a jury to bring in a verdict which will *compensate* an injured man, which will give him what he has lost, then there is little need of a jury argument in any cause.

Under the specific holding of the Supreme Court of Minnesota, passion and prejudice accounted for the size of the verdict; that is, it was larger than it otherwise might have been. The Minnesota Supreme Court *did not hold* that pas-

sion and prejudice *accounted for the verdict against* defendant, but merely caused it to be *larger* than it otherwise might have been. *This was cured,* in the opinion of the Supreme Court, *by the reduction of the verdict.*

We have, therefore, a situation where the Supreme Court of the State said that the verdict was too large, because of passion and prejudice, but, under the familiar practice in the courts in that state, *the error was cured* by the reduction.

On page 28 of the Brief of Petitioner, *it is said* that the argument of counsel for plaintiff in the court below contained *dramatic appeals for sympathy. Where are they? There are no such appeals for sympathy.* Counsel for plaintiff specifically said, *"I am not here pleading for sympathy"* (411).

Counsel further said that he was *not "asking for a dollar he has not lost"* (405).

Furthermore, "I am not asking you for a dollar in this case *except what the evidence shows this man should have"* (407).

These are not dramatic appeals for sympathy. The jury was specifically told counsel was not asking anything for sympathy and *was asking only that the plaintiff be given that which he had lost, which the evidence showed he should have.*

Can anyone legitimately object to the following argument:

> *"I am not here pleading for sympathy. I am not here pleading for anything but the common justice that a laboring man is entitled to,* and the time must never come, men and women, when a man who works for a living, when a man who works for a great and mighty railroad company, cannot walk into the courts of jus-

tice and there *have his rights determined as fairly and as honestly as though he were the highest man in the land*" (411).

Again, counsel said this:

"You take this case and when you write that verdict *write it with an eye to justice and to honesty and to fairness,* and when you bring your verdict in that man, stranger though he may be to you, will be waiting here to receive that verdict. It is not a matter of importance whether the verdict satisfies me or not. It is not a matter of importance whether the verdict satisfies Mr. Fryberger or Mr. Boyle, but it is a matter of importance that you do not take a dollar away from this man that he has lost" (411-412).

This is *an appeal to fairness,* not passion or prejudice.

We have quoted a few excerpts from the argument in order that the Court may get the idea of the spirit in which the case was presented. *The argument was not inflammatory.* It was not improper. It was a strong argument, an argument in which counsel showed some zeal for his client but it was an argument in language which was proper and *there was no appeal in any part of the argument to any passion or prejudice.* A reading of the entire argument will without doubt convince the Court of the correctness of the position of Respondent and of the claim that the argument was in no way improper.

DAMAGES NOT EXCESSIVE IN FACT.

If this Court is to consider the question of whether the argument of Respondent's counsel was an appeal to passion and prejudice, and is to consider the matter *de novo* as a

trier of the fact, then the question of what damages Moquin was entitled to is one which this Court should consider and determine as a fact, We do not believe that this Court is concerned with the amount of the damages returned but in view of the fact that the writ was granted and the cause is now before this Court, we call attention to the following: Moquin had a normal expectancy of 25 years as appears from the argument of counsel (406-407). He was earning $3,000.00 per year. If he earned nothing in the future and had he worked all of his expectancy his gross earnings would have totalled $75,000.00.

On page 407 of the Record, counsel, however, stated that it would be unfair to return such a verdict to Moquin. Counsel then proceeded to explain the expectancy tables and finally, on page 408 of the record, counsel suggested that although Moquin had been earning $250.00 a month; that the jury should figure that in his injured condition he might earn $125.00 a month. There certainly was nothing unfair about this. He had lost his ability to work as a railroad man at the wage of $250.00 per month. If he lost $125.00 a month, one-half of his previous earning power, over a period of twenty-five years he would have lost $37,500.00. Such sum, at 4% interest, as counsel pointed out (409-410), would return to him about one-half of what he had been earning. Counsel even went further and at the top of page 412 suggested to the jury that if they wanted to give all the advantage to the railroad company, Respondent would still be entitled to $26,000.00 in loss of earnings. It is apparent from this record and it can be seen by reading the figures given in the argument of Respondent's counsel that from a cold-blooded, mathematical, dollars and cents basis, the verdict could have been larger than it was.

It may be suggested in view of this, "Why did the Supreme Court of Minnesota reduce the verdict?" The answer is merely because the practice has grown up in the State of reducing verdicts when the Court thinks they are too high. As pointed out on pages 12 to 14, inclusive, of the Brief on the Motion to Dismiss or Affirm herein, verdicts are customarily reduced by the appellate court in Minnesota, even though no passion or prejudice appear or is claimed, other than as might appear from the mere size of the verdict. And, in the cases mentioned in the brief on the Motion to Dismiss, the Supreme Court of Minnesota reduced verdicts without even saying that the verdicts were the result of passion and prejudice.

NO OBJECTION TO THE ARGUMENT.

We wish again to call the attention of the Court to the fact that at the conclusion of all the testimony, after the arguments of both counsel, the Court asked the following question: *"Have counsel any further suggestion or request?"* (431.) *"Mr. Boyle: No, your Honor.* I have some exceptions, but I suppose we can take those after the jury goes out" (431).

The exceptions were to certain portions of the charge and the failure to give certain requests.

These exceptions had no reference whatever to the argument to the jury and neither during the argument nor after the argument was anything said by defendant's counsel, nor any complaint made as to the argument.

The case was tried before an upstanding District Judge in the State of Minnesota. *He found nothing improper in the conduct of the case. He heard the trial. He heard the arguments of both counsel to the jury.* He asked counsel

the question of whether there were any suggestions. He was not asked to admonish counsel as to any statement made to the jury nor was he asked to instruct the jury to disregard any statement counsel may have made. He promptly denied the motion of the railroad company for a new trial.

THE CLAIM OF PETITIONER.

At the top of page 4 of the Brief of Petitioner it is said that plaintiff's counsel made "a highly inflammatory speech." This is an incorrect generality and an incorrect conclusion. Following this statement is the claim that plaintiff's counsel suggested that railroad companies tried to fasten the charge onto the plaintiff "that he was a perjurer and a liar" (392).

The above statement is the only statement in the entire argument which Petitioner criticizes which had anything to do with the question of liability in this case. The next criticized statement as appears from page 4 of Petitioner's Brief is a statement appearing at page 403 of the Record. This statement was made during the argument of counsel as to damages.

MOQUIN'S TESTIMONY IN DIRECT CONFLICT WITH THAT OF DEFENDANT'S WITNESSES.

We have, therefore, on the question of liability, a statement of counsel for an injured man in which he says:

> "I have often wondered if the time would ever come when an injured man could come into a court of justice without having a railroad company try to fasten upon him that he was a perjurer and a liar. I wonder if it is true that the only time men can tell the truth is

when they draw their pay checks from the railroad company" (392).

In addition to what has heretofore been said as to the defendant's claim that there was no ice over the track when Moquin said there was, the defendant claimed that the accident happened at a place other than where the ice covered the track. There are other conflicts in the testimony, it being apparent from the whole Record that defendant claimed Moquin was not telling the truth. One Rennie, the conductor, stated that he did not remember whether he had told Moquin "that ice derailed that car" (see argument of counsel, bottom of page 391). The witness Carr, a brakeman, took the stand and he was asked if he had not stated to Moquin that ice derailed the car, which he denied.

"Q. Will you now state that you did not tell Noah Moquin there that you had stated to the company in the investigation that there was ice on the rail that caused the derailment, ice and snow, isn't that a fact, Mr. Carr?

A. No, it is not" (157).

Moquin said Carr made this statement to him (366).

With testimony of this kind in the record Moquin certainly would not be characterized by defendant's counsel as a truthful man.

It cannot be that, in the administration of justice an injured man may be dragged through all the courts and finally deprived of his right to recover the damages which a jury, a trial court and the highest court of a state have said belonged to him because his counsel truthfully and correctly stated *that the railroad company, in effect, claimed that the plaintiff was a perjurer and a liar. This is just exactly what they did claim.* Moquin testified that the rails where the car went off the tracks *were covered* by snow and ice;

that some of the ice was over the top of the rails. *In this he was substantiated by three disinterested witnesses.* But the *section men and other employees* of the railroad company *said there was no ice over the rails.* There was no chance for a mistake. There *was* ice over the rails or there was *no* ice over the rails. Either Moquin or Carr told the truth as to the statement "ice derailed that car" (366) (391). In any event, this statement related to the quesion of liability and there can be no question in the mind of any unbiased person who reads this record but that the railroad company was negligent and responsible for the derailment of the car which injured Moquin.

But the company went further and even advanced the claim that the derailment did not take place where the ice covered the rails although the testimony of plaintiff and his witnesses was positive on this point.

NO ERROR IN REFERENCE TO DEFENDANT COMPANY OR HANDICAPS OF PLAINTIFF.

We come now to another "offense" committed by plaintiff's counsel. To quote from page four of the Brief of Petitioner:

> "He spoke of 'the difficulties of a man, single-handed, fighting a powerful corporation'; the 'feeling of superiority * * * of men who represent corporations'; and the handicaps of a man fighting in behalf of 'what they call the under dog'" (R. 403).

This statement was made in connection with the argument on the question of damages. Unfortunately, this Court does not know what counsel for the railroad company said in his argument to the jury. It does not know what con-

duct during the trial might have produced the remark but, regardless of this, is a jury so silly, so utterly devoid of sense, so easily swayed, that the statement that a man is fighting a corporation and that he represents the under dog is going to take from a jury its common sense and destroy the ability of a jury to properly decide a case? The idea is not only preposterous. It is downright silly. The jury system is the law of the land, despite the fact that there are continued attempts to lessen the jury's influence. We think the statement of the Supreme Court of the United States in *Jones vs. East Tennessee, V. & G. Ry. Co.*, 128 U. S. 443, 9 Sup. Ct. 118, 32 L. Ed. 478, although on another point is applicable to this situation:

> "We see no reason, so long as the jury system is the law of the land, and the jury is made the tribunal to decide disputed questions of fact, why it should not decide questions *as* these as well as others."

Could this allegedly highly inflammatory language of counsel arouse such passion and prejudice in the minds and hearts of jurors that they could not perform their function? If so, we must presume that the jury had no intelligence. We can hardly do this, despite the criticism heaped upon juries by counsel for railroad companies. We would rather take the view of the late Justice McKenna who said:

> "The jury, as one of the tribunals of the country, must be presumed to have *some* sense."
>
> *Norfolk & W. Ry. Co. vs. Holbrook*, 235 U. S. 625, 35 Sup. Ct. Rep. 143, 59 L. Ed. 392.

On page four of the Brief one of the allegedly highly inflammatory statements is that counsel for Respondent described him as "giving to this mighty railroad eighteen of the best years of his life." This is called an *inflammatory*

statement. It needs no comment. By no possible stretch of the imagination can such a statement as this be deemed highly inflammatory or an appeal to passion.

Then it is said on page four of the Petitioner's Brief that the company came into court "'to fight that man and send him out of this court room stamped as a cheat and a fraud' when it 'in common decency and common honesty, if they possess it, should pay this man'" (R. 404).

Respondent WAS stamped as a cheat and a fraud. The evidence of the railroad company was directly opposite and diametrically opposed to that of Moquin. *There was no room for mistake. Either there was ice over the rails or there was no ice over the rails.* Moquin could not have been *mistaken* about it. If the ice was over the rails, he told the truth. If he said there was ice over the rails when there was no such ice, he did not tell the truth. Counsel for Respondent did not mince matters. He spoke out. He called a spade a spade. This was no occasion for pussy-footing, no occasion for weasel words or straddling. *Moquin was either honest or dishonest* and counsel squarely put the issue up to the jury. In this connection, it might be stated that the record showed that three disinterested farmers at Cloverton, where the accident happened, in all things sustained the Respondent in his contention.

Had it not been so serious, it would have been amusing to note the defense to the effect that the place where the ice covered the tracks was not the place where the car was derailed. The first claim was that of the section men that there was no ice over the rails. When this defense seemed wobbly, it was claimed that the derailment happened at some other place. As counsel for plaintiff stated, "Their defense seems to be that the ice was ten or twelve feet from where three men said it was" (385).

On page four counsel for Petitioner takes offense because Respondent's counsel referred to him as "a cool, calculating corporation lawyer" (397). As hereinbefore pointed out, the above quotation may be misleading.

It may be that it is a heinous offense to refer to one as cool, calculating. We wonder how it compares with repeated assertions of counsel for railroad companies that those who fight for injured men are "ambulance chasers"? How does it compare with that portion of the Brief of this railroad company, pages 13 to 28, all of which pages have nothing to do with the matter here at hand but contain references to illegal and unlawful practices by attorneys, to champertous contracts, to subornation of perjury and to "ambulance chasing"?

The last quotation from the argument of counsel for Respondent which appears in the Brief of Petitioner on page four was a reference to Respondent as "dragging himself up to the doors of the factories and the work shops of America" in search of employment (408). To characterize this statement as a highly prejudicial and inflammatory remark that would arouse the passion and prejudice of the jury is to call "white" "black." It was a statement fully justified and a proper and legitimate argument.

THE POSITION OF THE SUPREME COURT OF MINNESOTA.

The Supreme Court of Minnesota *upheld the verdict* in this case, as reduced. It held that the railroad company *was guilty of negligence*, proximately causing Respondent's injury. On the question of the *ultimate liability* of the railroad company, the Supreme Court of Minnesota had no difficulty.

On the question of misconduct in the argument of counsel the Supreme Court of Minnesota said: "The record was not protected. Counsel for *defendant adopted a course* which this court does not approve" (471). The court then said that the settled principles and the settled rules in the State of Minnesota *would not be departed from* and that any question of any error as to the argument of counsel *was not properly before the court.*

THE ALLEGED ERROR OR PREJUDICIAL CONDUCT AS TO COUNSEL'S ARGUMENT RELATES TO THE QUESTION OF DAMAGES.

The only comfort that the railroad company can get from the majority opinion of the Supreme Court of Minnesota is from the following statement: "From the entire record before us we are of the opinion that the verdict is excessive because of passion and prejudice."

It is to be noted that this statement says, "From the entire record." The only claim of anything in the record causing the excessiveness is the alleged passion and prejudice in the argument of plaintiff's counsel.

This court has limited the review in this case to the question of whether "the verdict was obtained by *appeals to passion and prejudice.*"

There is no statement by the Supreme Court of Minnesota that the verdict was the result of any *appeals* to passion and prejudice.

The railroad company takes much comfort from the dissenting opinion of Mr. Justice Stone of the Minnesota Supreme Court. Counsel for Petitioner does not, however, refer to the partial dissent of Mr. Justice Dibell of the Minnesota Supreme Court who states: *"I do not agree that pas-*

sion or prejudice is shown and that there should be a reduction of damages. The verdict should stand. Otherwise, I am in accord with the opinion" (472).

In the dissenting opinion of Mr. Justice Stone, it is said that the "jury yielded to passion and prejudice *in assessing damages.*" He states that the conclusion of passion and prejudice arises "when the *verdict is compared* with those customarily rendered where a farmer or artisan is the plaintiff and the defendant not a railway company."

Of course, the *amount of damages* is no concern of this court but, arguendo, it might be remarked that if a farmer or ordinary artisan were the plaintiff and had shown a loss of vocation and a loss of a maximum earning capacity of $3,000.00 per year, the verdict would doubtless have been approximately the same as that rendered. We doubt if counsel can find any record of an action where a farmer or artisan is the plaintiff and similar facts on the question of damages appear. If so, the verdict could not but be large.

Judge Stone dissented from the main opinion because he felt that the railroad company received only "a *small portion* of the relief" which it was entitled to. As he states: "It is for that reason I am unable to agree to the result." In other words, he dissents on the question of the amount of damages, or the size of the verdict.

The decision of the Minnesota Supreme Court, therefore, is:

First, to the effect that *the question of improper conduct of counsel was not raised*, and,

Secondly, that the question of passion and prejudice *had its effect alone upon the size of the verdict, i. e.*, the amount of damages, a question with which this court has no concern.

ARGUMENT.

THE PETITION FOR WRIT OF CERTIORARI WAS IMPROVIDENTLY GRANTED AND IT SHOULD BE DISMISSED.

State Practice Governs. No Objection to Argument. The Judgment Should Be Affirmed.

The question of whether the writ was improvidently granted and the question of whether the judgment should be affirmed will be argued together.

On the question of procedure, the state court is supreme even though the case arises under the Federal Act. The question of making objections and taking exceptions is a matter of local practice. It is not a matter for consideration by the Supreme Court. In *Chesapeake & Ohio R. Co. vs. DeAtley,* 241 U. S. 310, 60 L. Ed. 1016, Mr. Justice Pitney said, speaking of a complaint as to the form of certain instructions:

> "Although the present action was based upon a federal statute, *it was triable and tried in a state court.* Hence, *local rules of practice and procedure were applicable.*"

To the same effect, see *Central Vermont R. Co. vs. White,* 238 U. S. 506, 59 L. Ed. 1433, and *Minneapolis & St. Louis R. Co. vs. Bombolis,* 241 U. S. 211, 60 L. Ed. 961.

The above cases are referred to in the motion to dismiss or affirm.

Remembering now that no objection was taken to the argument and that counsel was given no opportunity to retract any statement which he may have made which might have been deemed improper, or to state for the record that such statement was in answer to argument indulged in by

defendant's counsel, and that the trial court was given no opportunity to admonish the jury not to heed such remark, we come to the long established rule in the State of Minnesota.

THE MINNESOTA RULE.

It is significant that in the Brief of Petitioner herein not one reference is made to the rule in Minnesota which is to the effect that an objection must be taken to the argument of counsel. Petitioner's counsel do not refer to this because it is the undenied and indisputable rule in the State of Minnesota. For instance, *In re Webber's Estate*, 163 Minn. 389, 204 N. W. 52, Mr. Justice Holt, speaking for the Supreme Court of Minnesota, said:

> "The record *does not raise the question* of misconduct of counsel in the final argument to the jury. *The address appears in full in the record*, but at no place was there *any objection made* to the language used. There was only one interruption, and that was when appellant's counsel questioned whether contestant had testified that her mother was 'fond of' the grandchild, and no error is or could be assigned on that incident. IN ORDER TO ASSIGN ERROR ON MISCONDUCT OF COUNSEL IN THE ARGUMENT to the jury, OBJECTION MUST BE MADE AT THE MOMENT THE ARGUMENT BECOMES IMPROPER, SO THAT THE TRIAL COURT MAY BY ADMONITION TO THE JURY, IF POSSIBLE, COUNTERACT ITS EVIL EFFECT. COUNSEL CANNOT SIT SILENTLY BY WHILE THE OBJECTIONABLE ARGUMENT IS DELIVERED AND TAKE EXCEPTION IF THE VERDICT IS ADVERSE. THE TRIAL

COURT'S ATTENTION MUST BE CALLED TO THE MISCONDUCT WHEN IT OCCURS, AND ITS ACTION OR RULING THEN REQUESTED."

The above quotation is a complete answer to the claim of the Petitioner in this case.

There could be no language more in point than the language from the Webber case above quoted, and there is reason and logic back of the rule as given in the Webber case.

Had there been an objection to any part of the argument of counsel for Petitioner, counsel would have had the opportunity to state to the Court that his remarks *were in answer to certain remarks of counsel for the railroad company.* He could have *inserted in the record the remarks of counsel for the railroad company which called for the comment in question.* The argument of railroad counsel was not taken, but, had objections been taken to the argument, a record could have been made. Unfortunately, the argument of railroad counsel does not appear. We do have pages 13 to 28 of the Brief in this Court, couched in language which should give this Court some inkling of what counsel for Respondent had to contend with.

The trial court was present and heard all of the argument. He heard the argument of railroad counsel and, from his vantage point, he found nothing objectionable.

The Webber case gives the Minnesota rule. The rule laid down by this court in the *DeAtley Case,* 241 U. S. 310, *supra,* the *White Case,* 238 U. S. 506, *supra,* the *Bombolis Case,* 241 U. S. 211, *supra,* is *that state rules of practice and procedure govern.* The Minnesota rule and the holding of this Honorable Court make it apparent that the Writ of Certiorari herein should not have been granted, or that the judgment should be affirmed. If it may be said that the

writ was not improvidently granted, certainly the judgment should be speedily affirmed because the question now before this court is wholly without merit.

The Alleged Passion Relates to the Question of Damages.

There is no question from a reading of the opinion of the Supreme Court of Minnesota but that the claim of passion and prejudice could only relate to the matter of damages. This is so because the court says: "The verdict was $27,500. From the entire record before us we are of the opinion that the verdict is *excessive* because of passion and prejudice":— Not RENDERED because of passion and prejudice but EXCESSIVE because thereof.

This relates to amount. This relates to damages. The court does not say that the liability was fastened onto the railroad company because of any passion or prejudice. It does not say that the "inflammatory" argument caused the jury to sustain plaintiff and three disinterested witnesses in plaintiff's contention that ice covered the rails. The opinion says that the verdict is excessive. This can only mean that the amount was too large. It cannot mean that there was a verdict for the plaintiff when there would have been a verdict for defendant but for counsel's argument. *It goes to the amount of the damages, a question with which this court has no concern.*

There can be no question about the fact that this court has no *concern with the mere amount of damages.* As this court specifically stated in *St. Louis, I. M. & S. Ry. Co. vs. Craft,* 237 U. S. 648, 59 L. Ed. 1160: "The award does seem large, *but the power and with it the duty and responsibility, of dealing with the matter, rested upon the courts*

below. It involves only a question of fact, and is not open to reconsideration here."

That is just exactly this case. It involves a question of fact. It involves a matter which was for determination by the lower court. It is not open to review.

There might be a semblance of reason to the contention of counsel for the railroad company if it appeared that a verdict on the question of liability was the result of passion and prejudice. In other words, if the liability depended solely on passion and prejudice, then something could be said for petitioner's argument. On the present record, however, *ultimate liability is in effect conceded.* It must be conceded in view of the jury's verdict. A question of liability, based alone on passion and prejudice, would present an entirely different question than now confronts this court. Responsibility in a case under the Federal Act must be based on negligent conduct. *It was so based in this case. Negligent conduct was overwhelmingly shown.* It was found to exist by the jury. The finding of the jury as to negligent conduct was approved by the trial court and approved without question by the Supreme Court of Minnesota.

There were two dissenting opinions in the Minnesota Supreme Court, one to the effect that no passion or prejudice was shown, the other to the effect that passion and prejudice had been shown *"in assessing damages"* (473).

The Decision of the Supreme Court of Minnesota on the Question of Defendant's Liability.

In the opinion of the Minnesota Supreme Court, it was said:

> "Under the plaintiff's testimony he was acting under orders of the conductor and engaged in a switching

movement. His testimony is to the effect that, under the snow, ice had been permitted to accumulate so as to be over an inch thick above the rails. The claim is that this was known to defendant's section foreman; that such ice was the cause of the derailment."

It was then stated in the opinion, in a general way, that defendant denied plaintiff's claims, and then it was said:

"Defendant's evidence puts the derailment before it reached the crossing, and attempts to attribute the derailment to the presence of the snow only.

"Under the evidence, it was for the jury to determine whether *plaintiff's* claims were true. Defendant's claims were *presented in opposition to the plaintiff's contention. This included the question of negligence, contributory negligence, and assumption of risk. The jury has committed us to plaintiff's version. The evidence is sufficient to sustain these findings."* (The opinion does not state that these findings were the result of passion and prejudice.)

We particularly call attention to the quotation just made in which the Supreme Court of Minnesota specifically said that the evidence was sufficient to sustain the findings of negligence on the part of the defendant. The Court said it was committed by the finding of the jury to plaintiff's version. The holding is clear, unequivocal and unqualified to the effect that the defendant was negligent and that its negligence caused plaintiff's injury. Up to this point in the case, there is no mention of passion or prejudice. AT NO PLACE IN THE OPINION, SO FAR AS THE QUESTION OF LIABILITY IS CONCERNED, DOES THE MINNESOTA COURT MENTION THE MATTER OF PASSION AND PREJUDICE.

From the facts, as they appeared, and from the jury's verdict, the Minnesota Court specifically said that the question of liability was for the jury, and *"the jury has committed us to plaintiff's version.* The evidence is sufficient to sustain these findings."

A reading of the opinion of the Minnesota Court leaves no doubt but that this verdict was not, in the opinion of the Minnesota Court, based on passion or prejudice.

The verdict was based on the evidence. The opinion of the Supreme Court of Minnesota held that the evidence was sufficient to sustain the verdict in plaintiff's favor and held that plaintiff was entitled to prevail.

Even in the dissenting opinion of Mr. Justice Stone, to which counsel for the railway company refer in their Brief, it is said: "The opinion demonstrates that the first jury yielded to passion and prejudice *in assessing damages.*"

There can be no escape from the proposition that, at most, the question of passion and prejudice *could only extend to the size of the verdict—to the amount of damages given*—questions with which this Court is not concerned.

The railroad company is confronted at the outset with a triple barrier:

First: *The record was not protected and the question of misconduct of counsel or prejudicial argument was not properly before the Supreme Court of Minnesota.*

Second: *The question is entirely one of state practice and procedure, and not one for consideration by this Honorable Court.*

Third: *The alleged prejudicial argument related to the amount of damages awarded and is not open to consideration here.*

Petitioner's Shifting Positions.

A reading of the Petition for the Writ of Certiorari herein will disclose a much different attitude on the part of counsel for Petitioner on the question of ultimate liability than appears in the Brief of Petitioner on the merits herein. *In the Petition for Certiorari the question of any liability on any theory was vigorously denied.* On page three of the Brief of Petitioner, filed after the writ was granted, but limited to appeals to passion and prejudice, it is said: "Thus there was a *fundamental question of fact for the jury on which petitioner's liability depended.*" No such statement appeared in the original petition.

Again on page six of the Brief of Petitioner, it is said: "The evidence as to the facts on which petitioner's liability was asserted *made a question for the jury as to their existence.*

In the Petition for the Writ on page 20, reliance is placed on the case of *New York Central R. Co. vs. Johnson,* 279 U. S. 310. This was a case which originated in a Federal Court and in the opinion of this Court there were some general statements to the effect that objections need not be taken to the argument of counsel. In that case, however, objections were taken in the Court below, the principal claim being that they were not sufficiently specific. However, that case was one originating in a Federal Court. *It did not involve a state rule of practice and procedure as did the case at bar.* The citation of the case may well have mislead the Court as pointed out by Respondent on page eight of its Brief on the Motion to Dismiss or Affirm herein. No mention of the Johnson case is made in the Brief of Petitioner.

THE ATTACK ON COUNSEL FOR PLAINTIFFS GENERALLY.

Pages 13 to 28 of Petitioner's Brief deal with the general question of the right of plaintiffs to maintain actions in certain places, the question of bringing actions in jurisdictions where the cause did not arise, so-called "ambulance chasing," etc.

These questions are not before this Court. They have nothing whatever to do with the question of whether or not the Petitioner has come within the rules laid down by the laws of the State of Minnesota and by this Honorable Court. This portion of the Brief, consisting of a general attack on personal injury lawyers, written in the vein of virtue so often assumed by defendants' counsel, is in point on no question before this Court.

It cannot but be apparent to the Court that the purpose of this matter, the cry of ambulance chasing, solicitation, etc., is made with the hope and with the idea that it will prejudice this Honorable Court against Respondent and Respondent's counsel.

It cannot but be apparent to this Court that counsel who would indulge in conduct of this kind, who would devote over half of a brief to the statement of matters intended to be prejudicial *might well have conducted themselves with like impropriety in the trial court.*

The Brief contains numerous references to causes with which counsel for Respondent herein were not concerned, in which they did not act as counsel and in which they had no part. *Criticism of other counsel for plaintiffs is set forth in the Brief.* For what purpose? Does it assist the Court in determining whether or not railroad counsel in the present case observed the rules of the State of Minnesota? Does it

assist the Court in determining whether railroad counsel are within the rules laid down in the DeAtley, White and Bombolis cases, *supra*? Clearly, it does not, and its sole and only purpose is to try to prejudice the Highest Court in the land, to get into the minds of this Court that counsel for this Respondent are mere "ambulance chasers" suborners of perjury and that, therefore, established rules of practice, procedure and of law should be set at naught and this injured man should be sent back again to once more go through the ordeal of trial, motion for new trial, appeal to the Supreme Court of Minnesota, the customary and much abused application for a Writ of Certiorari and all that such proceedings entail.

On page 28 of the Brief the following occurs:

> "A reading of counsel's so-called 'argument' to the jury (R. 383-413) discloses an *unmistakable purpose* to prevent the jurors from giving impartial consideration to the questions on which petitioner's liability depended."

This statement is not borne out by the record. It cannot be sustained by a reading of the argument. There was no "unmistakable purpose to prevent the jurors from giving impartial consideration" to the questions of liability in the case. We earnestly invite a reading of the record on the question of liability. Facts were argued to the jury. There was no attempt to prevent the jurors from giving impartial consideration to the question of liability.

Furthermore, on the question of liability, there is nothing in the record even remotely indicating any passion or prejudice. It specifically appears from the opinion of the Supreme Court of Minnesota that the *only question of passion or prejudice in the case related to the amount of the verdict.*

The amount or size of the verdict is not open to consideration here.

If we assume, as we must under the record, that Petitioner's ultimate liability is based on negligence, which the jury found, which the trial court upheld, and which the Supreme Court of the State of Minnesota upheld, then the only question to which passion and prejudice could relate is the question of the amount of the verdict. Mr. Justice Dibell, in a dissenting opinion, said there was no passion or prejudice shown. Mr. Justice Stone said there was passion and prejudice "in assessing damages."

A consideration of the question of damages in this case, will disclose that the Court could well have upheld the verdict under the cold record as heretofore pointed out.

However this may be, the question of the amount of damages is not one for consideration by the Supreme Court of the United States. *The proper rule of damages was given to the jury. The proper measure of damages* was explained to them. There is *no question* before this Court *that any improper instruction was given to the jury* as to the permissible method of computing the damages. Where the *proper rule and measure* of damages is given to the jury, the question of the *amount* is for the jury's consideration, subject to the corrective power of the lower court. It does not present a question for this Court.

However, it may be said that the Supreme Court of the State said that *the verdict* was the result of passion and prejudice and that a verdict so resulting cannot stand under the Federal Act.

The answer to this contention is that the *verdict was not the result of passion and prejudice*, so far as the question of liability is concerned. The question of passion and prejudice had to do solely *with the amount of the verdict.*

To reverse this case because the verdict was excessive because of passion and prejudice would lay down a new rule and would mean that in every case where a state court reduces a verdict because excessive "appearing to have been given under the influence of passion and prejudice," the Supreme Court of the United States would grant a new trial. To answer categorically the question of whether a verdict resting *solely* on passion and prejudice could be sustained, we would say "No." A verdict under the Federal Act must rest on negligence. This one does. It rests on strong proof of negligence, amounting almost to wantonness. The Respondent sustained serious injuries. A jury made an award of damages. The Supreme Court thought the award was too high, "appearing to have been given under the influence of passion and prejudice." *There is nothing in the record at any place to in any way justify any claim that the question of liability was arrived at because of passion and prejudice.* The few statements singled out from counsel's argument with one exception relate to the question of damages.

The charge of impropriety can with much better grace be levelled against counsel for Petitioner because of the use of such words as "unscrupulous, improper practices" (28); "vicious tendencies" (27); "cases * * * procured, fomented and tried in contemptuous defiance of law and proper legal practices" (27); "illicit investments" (27); "illicit methods of recovery" (28); and the claim made at the top of page 28 of the Brief of open and flagrant appeals "in order to induce the jurors to violate their oath" (28).

These statements are improper, unwarranted, unfair, unjustified, uncalled for by anything in the argument of counsel to the jury in this case. We will not, in this Brief, retort in language of the kind used by Petitioner's counsel. It would not be becoming a practitioner before the Supreme

Court of the United States so to do. We will merely submit the matter to this Court with a statement that a reading of this most intemperate Brief cannot but convince the Court that in comparison with the conduct of counsel for the railroad company, the argument of Respondent's counsel was extremely mild.

In the first paragraph of page six of the Brief for Petitioner, it is said that counsel for the plaintiff *"deliberately invited* the element of passion and prejudice into the case to improperly influence the jury."

We invite a most careful reading of counsel's argument and there is no question but that such statement cannot possibly be sustained.

It cannot be that a client is to be punished because of the honest zeal of his counsel. We do not believe that the time has come when in an action to recover damages for an injured man, plaintiff's counsel must present his argument to the jury in a sing song monotone. The Honorable Pierce Butler of this Court did not present matters to a jury in that fashion when he was engaged in the trial of causes in the State Courts of Minnesota and other states. It has never been said that the Chief Justice of this Honorable Court employed that method in presenting causes in behalf of his clients, nor has it yet been held by any court that a mere show of some life and of some emotion on the part of an attorney constitutes a wrong.

If, by a wild flight of the imagination, we assume that the argument in question was improper, can this Court now say that the due and proper administration of justice dictates that the Respondent, Noah Moquin, must be punished by having his case sent back again for retrial? We cry about the law's delays. Is there any rule of justice or of law which requires that this man, who was injured by the un-

doubted negligence of the railway company, on the 27th day of February, 1928, should now, more than three years after the date of his injury, be told that he must go back again and start to climb the long hill of a trial, in the District Court, the inevitable appeal to the Supreme Court and the now popular and abused application for a Writ of Certiorari? Justice not only does not demand that this be done but it will cry out in abhorrence at the thought of compelling this litigant to again go through this ordeal because, perchance, his counsel may have grown enthusiastic in his zeal to protect the rights of his client. It is like punishing one for a crime when there is no statute defining the crime. If the wrong was committed, Respondent's counsel had no knowledge thereof at the time, no objection was made, he was given no opportunity to retract or ask the jury to disregard the statement or to make amends or to state that the statement was in answer to counsel's argument.

The trial court was given no opportunity to admonish the jury to pay no heed to the statement. The Supreme Court of the state said that the point had been waived and now, three years after Moquin has been injured, it is asked, in the interests of justice, to send him back to a State Court to again follow the weary road to the doors of this Honorable Court.

This Court is asked to do this, despite the rule of the State Court, despite the fact that this Court does not consider the question of damages, despite the fact that this Court has repeatedly said that such matters of practice and procedure were wholly for the State Court's determination.

It is bad enough to think that nearly a year has now elapsed since this man's rights were determined by the Supreme Court of the State of Minnesota. Still he is without the recovery which the jury and the Minnesota court

awarded him and Petitioner, with a show and claim of virtue, insists that, despite its failure to observe the settled rules of practice of the State of Minnesota, that this Court should order this man back to trial in the District Court of the State.

If this is done, it will result in overturning the settled practice of the State of Minnesota. It will be a new and a startling rule—*a rule to the effect that the law of the state as to practice and procedure in causes before it no longer controls* but that *on any question of practice and procedure,* on the question of the mere amount of damages, *the laws of the state are to be set aside* and the established rules of procedure are to be overturned and because of what? Because of an argument, which taken in its entirety, is not unfair, is not prejudicial, but merely represents the honest, zealous effort of counsel to secure justice for an injured man.

CONCLUSION.

The Petition for the Writ herein was, we believe, improvidently granted, and it should be dismissed. If the Writ were properly granted, then on the merits of the cause the judgment should be affirmed. The scurrilous matter in Petitioner's Brief should be ordered stricken.

Respectfully submitted,

TOM DAVIS AND ERNEST A. MICHEL,

Attorneys for Respondent.

SUPREME COURT OF THE UNITED STATES.

No. 543.—October Term, 1930.

Minneapolis, St. Paul & Sault Ste. Marie Railway Company, Petitioner, *vs.* Noah Moquin. } On Writ of Certiorari to the Supreme Court of the State of Minnesota.

[May 18, 1931.]

Mr. Justice Roberts delivered the opinion of the Court.

Respondent sued petitioner in the district court of Crow Wing County, Minnesota, to recover damages for injuries sustained in the course of his employment in interstate commerce. The trial resulted in a verdict for the respondent, which petitioner moved to set aside on the ground that misconduct of respondent's counsel in making appeals to passion and prejudice had prevented an impartial trial. The motion was denied, and petitioner appealed to the Supreme Court of Minnesota. That court referred to the state practice which requires counsel to interrupt and have the language used by offending counsel placed upon the record, to ask the court to instruct the jury to disregard it, and to take an exception, if thought advisable. It, however, criticised the conduct of respondent's counsel, and said: "In the absence of objection from counsel, it may become the duty of the court to act on its own motion. . . . From the entire record before us we are of the opinion that the verdict is excessive because of passion and prejudice."

A new trial was ordered, unless the respondent should file in the trial court a writing remitting a portion of the verdict. Such a remittitur was filed, and thereupon the trial court entered judgment for the remainder. The petitioner again appealed, and the Supreme Court affirmed, merely referring to its previous opinion. We granted a writ of certiorari limited to the question arising from the failure of the state court to grant a new trial in a case under

the Federal Employers' Liability Act where the verdict was obtained by appeals to passion and prejudice.[1]

It is unnecessary to cite from the record what occurred at the trial, or to discuss the propriety of the views of the court below as to the basis of the verdict. The finding is quoted above, and our sole concern is as to the action it requires. Nor need we inquire into the rules applicable in trials under state law. Whether under the state's jurisprudence the present record would entitle petitioner to a new trial or to such a conditional order as was awarded is immaterial.

In actions under the federal statute no verdict can be permitted to stand which is found to be in any degree the result of appeals to passion and prejudice. Obviously such means may be quite as effective to beget a wholly wrong verdict as to produce an excessive one. A litigant gaining a verdict thereby will not be permitted the benefit of calculation, which can be little better than speculation, as to the extent of the wrong inflicted upon his opponent.

The judgment is reversed and the cause remanded for further proceedings not inconsistent with this opinion.

Reversed.

A true copy.

Test:

Clerk, Supreme Court, U. S.

---

[1]282 U. S. —.